DEC 23 2002

Nos. 02-615 and 02-616

In the Supreme Court of the United States

LUIS E. DUBON-OTERO, PETITIONER

v.

UNITED STATES OF AMERICA

JORGE L. GARIB-BAZAIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the requirement in 28 U.S.C. 1865(b)(2) and (3) that a person must have minimal proficiency in English in order to qualify for jury service deprived petitioners of their Sixth Amendment right to a jury pool composed of a fair cross-section of the community.

2. Whether an organization that received federal funds to establish community centers for the treatment of AIDS and drug addiction received "benefits * * * under a Federal program" within the meaning of 18 U.S.C. 666(b).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-28a)[1] is reported at 292 F.3d 1.

JURISDICTION

The judgment of the court of appeals was entered on May 29, 2002. Petitions for rehearing were denied on

[1] References to the petition appendix are to the appendix in No. 02-615.

July 23, 2002. Pet. App. 29a-30a. The petitions for a writ of certiorari were filed on October 18, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of Puerto Rico, petitioners were convicted of conspiracy to embezzle property of an organization receiving federal funds, in violation of 18 U.S.C. 371 and 666. Petitioner Garib also was convicted of perjury before the grand jury, in violation of 18 U.S.C. 1623. The district court sentenced Garib to 60 months' imprisonment, fined him $10,000, and ordered him to pay $88,764 in restitution to the United States Department of Health and Human Services (HHS). The court sentenced petitioner Dubon to 60 months' imprisonment, fined him $125,000, and ordered him to pay $1,559,828 in restitution to HHS. The court of appeals affirmed.

1. Between January 1989 and February 1994, petitioners participated in a conspiracy to embezzle the property of the Advanced Community Health Services (Health Services). Health Services initially incorporated as a for-profit organization, but later became a non-profit corporation. Pet. App. 2a n.1. Petitioner Dubon, a lawyer, and petitioner Garib, a doctor, were shareholder-directors of the corporation. *Id.* at 2a. Garib served as Health Services' Medical Director, while Dubon served as legal counsel. *Ibid.* Dr. Yamil Kouri-Perez, a nominal "consultant" to Health Services, was actually in charge of the corporation's affairs. *Id.* at 2a-3a.

In January 1988, Health Services entered into a contract with the Municipality of San Juan under which

Health Services agreed to provide services for persons afflicted with AIDS. The Municipality agreed to pay Health Services $3.2 million per year for those services. Pet. App. 3a. Under the contract, Health Services became the exclusive source of AIDS counseling and professional services in San Juan. *Ibid.* As a result of that contract, Health Services began to receive federal funds. *Ibid.*

Before 1991, Health Services received federal funds to support an AIDS treatment and a drug addiction program. Pet. App. 8a; Gov't C.A. Br. 7. The program was funded as follows: The National Institute on Drug Abuse, a federal agency, provided a grant to Puerto Rico's Department of Anti-Addiction Services (DAAS). *Ibid.* DAAS transferred a portion of that grant to the Municipality of San Juan. *Ibid.* The Municipality, in turn, provided payments totaling $70,680 to Health Services to operate the program. *Ibid.*[2] After 1991, Health Services received hundreds of thousands of dollars per year in federal grant monies to conduct a wide variety of AIDS programs. *Ibid.*

Because the Municipality of San Juan had the authority to cancel Health Services' contract, petitioners used Health Services assets to purchase political support. Pet. App. 16a. Before the November 1988 election for mayor of San Juan, Garib gave mayoral candidate Jose Granados-Nevedo $100,000 in cash. *Ibid.* Granados-Nevedo lost the election to Hector Luis Acevedo, and the Municipality thereafter delayed payments on its

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[2] Before 1991, Health Services also received federal funds to test members of the public for AIDS, and to conduct an AIDS education project. Pet. App. 8a. Health Services received payments totaling more than $22,000 for the testing project, and $100,000 for the education project. *Ibid.*

contract to Health Services. *Ibid.* To resolve that problem, Kouri arranged to pay Mayor Acevedo and the director of the Health Department of the Municipality $5000 each per month. *Ibid.* The Municipality then resumed making regular payments on the AIDS contract. *Id.* at 16a-17a. Petitioners raised the $10,000 monthly payments by issuing checks to persons who performed no services. *Id.* at 17a. Petitioners Garib and Dubon signed many of those checks. *Ibid.* Dubon's law firm also was involved in cashing a series of checks to divert Health Services funds to make those political payoffs. *Ibid.* In testimony before a grand jury, petitioner Garib falsely denied having any role in making political payoffs. *Id.* at 26a.

Between 1987 and 1991, petitioner Dubon also received $10,000 per month from Health Services as a legal retainer, although the board of directors had authorized a retainer of only $5000. Pet. App. 15a. Someone tampered with the board minutes to change the authorization from $5000 to $10,000. *Ibid.* Dubon diverted half of each $10,000 monthly payment to Kouri for the payment of Kouri's rent and credit card bills. *Ibid.* Kouri could not be on Health Services' payroll because he was under contract to the Harvard Institute for International Development. *Ibid.* Garib also diverted Health Services money to pay a personal housekeeper and a secretary for his private practice. *Ibid.*

2. Federal law requires the exclusion from jury service of any person who "is unable to read, write, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form," and "is unable to speak the English language." 28 U.S.C. 1865(b)(2) and (3). Before trial, petitioners argued that those two exclusions violate the Sixth Amendment's fair cross-section requirement.

Based on controlling First Circuit precedent, the district court rejected that argument. See Pet. App. 31a-33a, 35a.

Section 666 applies to embezzlement of funds from any organization that receives, within one year before or after the violation, "benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance." 18 U.S.C. 666(b). At trial, petitioners requested the following jury instruction to define "benefits" within the meaning of the statute:

> Not every payment by the federal government to an organization constitutes federal "benefits" as required by the statute. Federal money paid to a private corporation as payment or fees for services already rendered by the corporation do not qualify as federal benefits. Similarly, payments made by the federal government to a private corporation as part of an ordinary commercial transaction do not qualify as federal benefits. Money paid to a corporation is a federal benefit if the corporation was required to "administer" the money under an agreement with the government or to ["]disburse" the money to others.

Pet. App. 52a.

The district court rejected that requested instruction as an inaccurate statement of the law. See Pet. App. 52a-53a. Consistent with the text of the statute, the court instructed the jury that, in order to return a guilty verdict, the jury must find that Health Services received "in any one-year period benefits in excess of $10,000 under a federal program involving a grant, a contract, a subsidy, a loan, a guarantee, insurance or other form of federal assistance." *Id.* at 19a-20a n.17.

The court further instructed that "[t]his section * * * does not apply to bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed in the usual course of business. *Ibid.*

3. The court of appeals affirmed petitioners' convictions and sentences. Pet. App. 1a-28a. The court of appeals rejected petitioners' contention that the English-proficiency requirements set forth in 28 U.S.C. 1865(b) deprived petitioners of their Sixth Amendment right to a jury composed of a fair cross-section of the community. Relying on circuit precedent, the court upheld the requirements based on the "the overwhelming national interest served by the use of English in a United States court." Pet. App. 28a (quoting *United States* v. *Aponte-Suarez*, 905 F.2d 483, 492 (1st Cir.), cert. denied, 498 U.S. 990 (1990)).

The court of appeals also rejected petitioners' contention that the evidence was insufficient to prove that Health Services received federal "benefits" before 1991. Pet. App. 7a-14a. The court held that Health Services had received "benefits" in the form of funds for an AIDS and drug treatment program that could be traced to a federal grant from the National Institute on Drug Abuse. *Id.* at 8a. The federal money reached Health Services by passing through the Commonwealth of Puerto Rico and the Municipality of San Juan. *Ibid.*

The court of appeals based its determination that Health Services received "benefits" on the following test set forth in *Fischer* v. *United States*, 529 U.S. 667 (2000):

> To determine whether an organization participating in a federal assistance program receives "benefits," an examination must be undertaken of the program's structure, operation, and purpose. The in-

> quiry should examine the conditions under which the organization receives the federal payments. The answer could depend, as it does here, on whether the recipient's own operations are one of the reasons for maintaining the program.

Pet. App. 9a-10a (quoting 529 U.S. at 681). Applying that test, the court of appeals concluded that Health Services received benefits for the same reason that the Court in *Fischer* had concluded that hospitals receive benefits under the medicare program. *Id.* at 11a-13a. The court reasoned as follows:

> One of the Institute's goals in making grants is to "insure care of good quality, in general community facilities." 21 U.S.C. § 1177(f). Under its contract with the Municipality, Health Services was the exclusive source of AIDS counseling and professional services in San Juan * * * supplying AIDS services under a federally financed program. * * * Therefore, the Institute would naturally intend its monies to assist Health Services in providing AIDS care, much as Medicare monies [involved in *Fischer*] assist hospitals in providing patient care.

Id. at 12a-13a (internal quotation marks omitted).

The court of appeals also concluded that "[i]t makes no difference that Health Services received this money indirectly." Pet. App. 13a. The court explained that "[i]t is now well established that benefits under § 666 are not limited solely to primary target recipients or beneficiaries." *Ibid.*

ARGUMENT

1. Petitioners contend (Dubon Pet. 9-23; Garib Pet. 27-30) that the requirement in 28 U.S.C. 1865(b)(2) and (3) that a person must have minimal proficiency in

English in order to qualify for jury service deprived petitioners of their Sixth Amendment right to a jury pool composed of a fair cross-section of the community. That contention is without merit and does not warrant further review.

In *Taylor* v. *Louisiana*, 419 U.S. 522 (1975), the Court held that the Sixth Amendment right to a jury trial includes a requirement that "jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof." *Id.* at 538. In *Duren* v. *Missouri*, 439 U.S. 357 (1979), the Court clarified that, "[i]n order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process." *Id.* at 364. Even if a defendant establishes a prima facie case, no constitutional violation has occurred if the challenged exclusion serves "a significant [government] interest [that is] manifestly and primarily advanced by those aspects of the jury-selection process, such as exemption criteria, that result in the disproportionate exclusion of a distinctive group." *Id.* at 367-368.

Petitioners assert (Garib Pet. 28) that they established a prima facie case by showing that an English proficiency requirement operates to exclude all persons who speak *only* Spanish. Assuming that persons who speak only Spanish constitute a "distinctive" group for purposes of the Sixth Amendment fair cross-section

requirement, an English proficiency requirement is nonetheless constitutional because it manifestly advances significant government interests. Most important, if jurors do not speak a common language, they cannot communicate among themselves, and communication is essential if jurors are to perform their deliberative function.

Petitioners assert (Dubon Pet. 17-19; Garib Pet. 29-30) that the use of translators can ensure effective communication among jurors who speak different languages. But, as this Court recognized in *United States* v. *Olano*, 507 U.S. 725 (1993), the presence of non-jurors in the jury room during deliberations "contravene[s] 'the cardinal principle that the deliberations of the jury shall remain private and secret.'" *Id.* at 737 (quoting Fed. R. Crim. P. 23(b) advisory committee's notes). It also creates a serious risk that the course of deliberations will be influenced in ways that would be impossible to detect. See 507 U.S. at 742 (Kennedy, J., concurring) (finding it "most difficult * * * to show the absence of prejudice" from the presence of a thirteenth person in the jury room, because of "certain premises about group dynamics that make it difficult for us to know how the jury's deliberations may [be] affected.").

Acceptance of petitioners' theory that an English proficiency requirement violates the fair cross-section requirement would also have far-reaching consequences. Many cities in this country contain several different groups that are unable to speak English and that speak another language exclusively. If the jury venire must include all such groups in order to ensure that the jury pool includes a fair cross-section of the community, some chosen juries would likely require multiple translators. A jury composed in that way

could not engage in the secret, deliberative process historically associated with a petit jury.

In addition, as the First Circuit has observed, "[f]ederal district courts in part are designed to provide trial alternatives for litigants, resident and nonresident, who seek the uniformity, expertise, and familiarity that they believe they may find in a national rather than a local forum." *United States* v. *Benmuhar*, 658 F.2d 14, 20 (1st Cir. 1981), cert. denied, 457 U.S. 1117 (1982). An English proficiency requirement "is both symbolically and functionally significant in achieving this goal." *Ibid.*

Those considerations fully justify a requirement that jurors possess proficiency in English. The court of appeals therefore correctly rejected petitioners' fair cross-section claim.

2. a. Petitioners contend (Dubon Pet. 23-26; Garib Pet. 11-19) that the court of appeals' standard for determining whether an organization receives federal "benefits" within the meaning of Section 666 conflicts with this Court's decision in *Fischer*. In finding that Health Services received federal benefits in the form of federal funding from the National Institute for Drug Abuse, however, the court of appeals expressly applied the standard set forth in *Fischer*. Pet. App. 9a-13a. In particular, the court correctly drew from *Fischer* the principle that a court must examine the "structure, operation, and purpose" of the relevant program to determine whether funds received by an organization are simply reimbursements for services rendered in the ususal course of business, or instead are federal benefits that are intended to further a broader public purpose. *Id.* at 9a-10a. The court further understood that, under *Fischer*, funding does not lose its character as a benefit simply because the ultimate beneficiary of

the program is someone other than the recipient of federal funds. *Id.* at 10a. And the court also recognized that the Court in *Fischer* had not endorsed the view that "all that was required for funds to constitute benefits * * * was to establish that they came from a federal program." *Id.* at 11a.

Petitioners argue (Dubon Pet. 23-26; Garib Pet. 11-19) that the court of appeals misapplied those principles, and that an examination of the program at issue in this case shows that the funds received by Health Services to operate an AIDS and drug treatment program were merely reimbursement for services rendered in the ordinary course of business and not federal benefits. But that question is entirely fact-bound; it therefore does not warrant this Court's review.

In any event, the court of appeals correctly concluded that, just as the hospitals in *Fischer* received benefits, Health Services received benefits here. In *Fischer*, the Court concluded that medicare payments to hospitals constitute benefits because "[t]he payments are made not simply to reimburse for treatment of qualifying patients but to assist the hospital in making available and maintaining a certain level and quality of medical care, all in the interest of both the hospital and the greater community." 529 U.S. at 679-680. Similarly, the statutory program under which Health Services received federal funds to serve AIDS patients and drug addicts was designed to "insure care of good quality, in general community care facilities." 21 U.S.C. 1177(f). Payments were not made under the program simply to compensate Health Services for specific individual services on a patient-by-patient basis. And, because "[u]nder its contract with the Municipality, Health Services was the 'exclusive source of AIDS counseling and professional services in San Juan,'" *ibid*, the fund-

ing from the Institute "assist[ed] Health Services in providing AIDS care, much as Medicare monies assist hospitals in providing patient care." *Id.* at 13a.

There is an additional reason that petitioners' challenge to the application of *Fischer* to the facts of this case does not warrant review. Health Services did not receive benefits only under the program identified by the court of appeals. Health Services also received funds after February 1991 under a variety of other programs. Petitioners conceded in the court of appeals that the federal monies Health Services received after 1991 were "benefits" under Section 666. Pet. App. 8a, 20a n.19.

The jury was not instructed to base its verdict on petitioners' post-1991 conduct alone, and petitioners, relying on *Yates* v. *United States*, 354 U.S. 298, 312 (1997), therefore argue that the conviction cannot stand based on that conduct alone because the conviction might have rested on pre-1991 conduct. See Pet. App. 7a. But, as the government argued in the court of appeals, *ibid.*, more recent authority from this Court permits harmless error review when the jury verdict would have been the same absent the alleged instructional error. See *Neder* v. *United States*, 527 U.S. 1 (1999) (guilty verdict may be upheld on appeal even if the jury was not properly instructed on an element of an offense, if any rational jury would have convicted defendant if instructed properly).[3] Here, any rational jury that found that petitioners were members of the charged conspiracy in 1989 would necessarily

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[3] The court of appeals did not reach the question of how *Neder* affects the analysis under *Yates* because it held that the pre-1991 payments were "benefits," so there was no instructional error. Pet. App. 7a n.5.

have found that they remained members through 1994. In those circumstances, any error in failing to instruct the jury to base its verdict exclusively on petitioners post-1991 conduct was at most harmless error.

b. Petitioners' remaining challenges to their convictions under Section 666 also do not warrant review. Petitioners contend (Garib Pet. 16) that Health Services did not receive benefits within the meaning of Section 666 before 1991, because it did not receive funds directly from a federal agency, but instead received the funds after they passed through the Commonwealth of Puerto Rico and the Municipality of San Juan. But as the court of appeals explained, Section 666 does not draw a distinction between those entities that receive funding directly and those that receive federal funding indirectly through intermediaries. Pet. App. 13a. *Fischer* itself makes clear that an entity that receives federal funds indirectly through an intermediary is covered by Section 666. As the Court noted in *Fischer*, hospitals that participate in the medicare program often receive federal funds through intermediaries. *Fischer*, 529 U.S. at 677.

In suggesting that entities that receive funding indirectly are not covered by Section 666, petitioners mistakenly rely (Garib Pet. 14-17, 20-21) on *United States Department of Transportation* v. *Paralyzed Veterans of America*, 477 U.S. 597 (1986), and *NCAA* v. *Smith*, 525 U.S. 459 (1999). Those cases interpret statutes that prohibit discrimination in federally assisted programs; they do not interpret Section 666. To the extent that those cases are relevant in construing Section 666, however, they support the conclusion that Health Services is a covered entity under Section 666. Under *Paralyzed Veterans* and *NCAA*, entities are covered by the nondiscrimination statutes if they

"receive federal assistance, whether directly or through an intermediary." *NCAA*, 525 U.S. at 468. Entities are not covered if they "only benefit economically from federal assistance" provided to others. *Ibid.* Health Services falls into the former rather than the latter category. It received federal assistance through intermediaries—the Commonwealth of Puerto Rico and the Municipality of San Juan; it did not merely benefit from assistance provided to others.

Petitioners also err in contending (Garib Pet. 19-21) that the decision below conflicts with court of appeals decisions holding that Section 666 does not apply to purely commercial transactions between the federal government and private organizations. The court of appeals expressly recognized that purely commercial transactions do not trigger coverage under Section 666. Pet. App. 10a n.8, 14a. But it concluded that, like medicare payments to hospitals, federal payments to Health Services for AIDS services and drug addiction did not constitute mere commercial transactions. Instead, they constituted benefits that were intended to serve the government's interest in quality patient care. *Id.* at 12a-14a.

Finally, petitioners argue (Dubon Pet. 26-29; Garib Pet. 21-24) that the decision below conflicts with decisions of the Second and Third Circuits holding that Section 666 requires proof that the charged misconduct implicates a federal interest. See *United States* v. *Santopietro*, 166 F.3d 88, 93 (2d Cir. 1999); *United States* v. *Zwick*, 199 F.3d 672, 687 (3d Cir. 1999). Petitioners, however, did not raise that contention in the court of appeals, and the court of appeals therefore did not address whether Section 666 contains such a requirement. That question is therefore not properly presented here.

In any event, petitioners' conduct plainly implicated a federal interest. By misappropriating money from Health Services, petitioners threatened the integrity of the federal funded programs operated by Health Services. Here, as in *Fischer*, petitioners "raise[d] the risk" that the target of their misconduct would "lack the resources requisite to provide the level and quality of care envisioned by the program." 529 U.S. at 681-682.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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